

AIR COMMAND AND STAFF COLLEGE

AIR UNIVERSITY

THIRD-PARTY PROTEST REGIME AND GAO PROTEST
STATISTICS: DOD VS. OTHER FEDERAL AGENCIES

by

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Abstract

The independent third-party protest regime began 83 years ago in 1926 when the General Accounting Office, the Government Accountability Office's (GAO) predecessor, began deciding federal contract award protests. Thirty years later in 1956, the Court of Claims established the judiciary's protest jurisdiction in *Heyer Products Co. v. United States*. Currently, the two primary third-party protest forums include the GAO and the Court of Federal Claims (COFC). Most disappointed offerors' file their protests with the GAO which considers approximately 1,300-1,400 protests annually. The advantages generally cited for filing with the GAO include efficiency, procurement law expertise, and low cost.

A number of recent high profile federal contract protests, including the Air Force's KC-X program, as well as an increase in the number of protests annually, have brought both the Department of Defense (DoD) procurement process and the GAO protest system under increased scrutiny. The Duncan Hunter National Defense Authorization Act of 2009 requires the GAO to review protests over the past five years to determine if frivolous protests represent a significant problem and recommend any reforms for improving the system.

A review of the quantitative data over the past five years indicates the DoD experienced protest, dismissal, and sustainment rates similar to, if not more favorable than, those of other federal agencies. However, the high dismissal and low sustainment rates for both the DoD and other federal agencies may indicate a need to reform the GAO protest rules and procedures to discourage the filing of frivolous protests. Three possible reform initiatives include revising the requirement to stay a contract award upon the filing of a protest with the GAO, assessing a financial penalty, and tracking a contractor's protest history.

Introduction

The committee is concerned that the submission of a bid protest is becoming pro forma...that the number of frivolous bid protests submitted to the Government Accountability Office may be increasing. While the committee remains committed to the right of prospective contractors to have an independent forum to adjudicate legitimate concerns about improprieties and errors during the bid and proposal evaluation process, the committee discourages the use of bid protests as a stalling or punitive tactic.

— Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 Report of the Committee on Armed Services of the House of Representatives on H.R. 5658

The Air Force's procurement of the next generation tanker, the KC-X, experienced yet another setback June 18, 2008, when the Government Accountability Office (GAO) sustained the Boeing Company's protest of the contract award to Northrop Grumman and the European Aeronautic Defense and Space Company (EADS). The GAO concluded "the Air Force had made a number of significant errors" in evaluating both offerors' proposals against the established award criteria.¹ The initial recapitalization effort involving the lease of 100 Boeing KC-767A tankers was cancelled in 2004 amidst a procurement integrity scandal that resulted in the conviction of Darleen Druyun, former Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management. Unquestionably, the failure to urgently recapitalize the tanker fleet could create a national security crisis in the not so distant future. The sensational circumstances surrounding the program tend to create an even more immediate crisis though, a crisis of confidence. The Air Force Chief of Staff General Norton Schwartz recognized both crises, and the inextricable link between the two, in his keynote address to the Air Force Association on September 16, 2008:

We do not want to repeat the KC-X tanker experience...[W]hat if, the KC-135 fleet were grounded during a crisis? That thought should make your heart stop...Our joint force would face immediate paralysis...Our Nation, our

collective security, cannot wait for the moment of crisis to wake up and realize the urgency of tanker recapitalization . . . We have to lead turn this critical acquisition priority and get it moving . . . or we will have failed in our obligation to the Nation. As the integrity of our acquisition process directly affects National security, we must also adhere to the highest standards of accountability to ensure we meet warfighter requirements.²

The crisis in confidence stems principally from two perceived shortcomings in the acquisition community: lack of ethical behavior and lack of competence. Although absolutely no fraud should be tolerated, do such breaches of a fiduciary responsibility accurately represent the level of integrity exhibited by the acquisition community at large?³ Dr. Jacques Gansler, former Under Secretary of Defense for Acquisition, put the extent of the problem in perspective: “of 15 million annual procurement actions, perhaps 1,500 involve illegalities . . . As Norman Augustine observed, relative to the approximately 3 million people involved in the military-industrial complex, ‘Is there any city, with even a small percentage of that number of people, without a jail?’⁴ The few incidents of unethical behavior frequently result in administrative or criminal action and tend to be well documented. However, the conscience shocking nature overshadows in the American psyche the frequency, or more correctly infrequency, of such unethical conduct. The American public tends to think such unethical conduct represents the norm in Government acquisitions.⁵ The KC-X protest sustainment may now be creating a similar overgeneralization pertaining to the competence of the DoD in evaluating contractors’ proposals for contract award and the efficacy of the GAO protest system.⁶ Adding to this, the number of GAO contract protests increased 17% in fiscal year 2008 over from the preceding year.⁷ However, DoD and Congress are fighting back. A *USA Today* article, entitled “Do Defense Contractors Protest Too Much,” succinctly captured the current blowback: “Quit Complaining. That’s the message from the Pentagon and Congress to defense companies that cry foul when they don’t win contracts.”⁸ This paper addresses the question of whether protest

statistics indicate that the DoD experiences higher GAO protest and sustainment rates than other federal civilian agencies which might indicate a systemic procurement problem unique to the DoD. In addressing this question, this paper first provides a brief history of the development of the independent third-party protest regime, outlines the current GAO protest process, and identifies potential motivations of disappointed offerors for filing protests. It then analyzes the DoD's and other federal agencies' protest statistics for the past five years. These statistics indicate that DoD experiences protest rates consistent with, if not more favorable than (i.e., lower), those of other federal agencies. Furthermore, the dismissal and sustainment rates for both the DoD and other federal agencies suggest that frivolous protests may be creating an unnecessary burden on the procurement process in terms of delays and money. This paper concludes with possible reforms to the third-party protest regime that would more appropriately balance its competing principles of efficiency and transparency.

History of the Independent Third-Party Protest Regime

It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals.

— Abraham Lincoln

The contemporary federal contract protest regime arguably dates back 83 years to 1926 when the General Accounting Office, created by the Budget and Accounting Act of 1921 and later renamed the Government Accountability Office by the GAO Human Capital Reform Act of 2004, published its first bid protest decision.⁹ Prior to this period, the only recourse available to disappointed offerors was to protest directly to the agency.¹⁰ The GAO relied not on any express statutory authority to consider bid protests but on an expansive interpretation of its implied authority to conduct audits and settle claims.¹¹ The GAO's assumption of this role in deciding federal bid protests constitutes a significant historical legal development in the procurement system. The significance rests in the fact that it represents the first time federal contract awards were, and would continue to be, subjected to independent third-party review. The ability of offerors to obtain review of contract award decisions by a disinterested third-party underwrites a fundamental principle of transparency in the federal acquisition process that endures today.

For more than 30 years, the GAO remained the sole independent third-party review forum for federal contract award protests. Early attempts to pierce the veil of sovereign immunity revealed reluctance on behalf of the judiciary to intercede in federal agencies' discretionary actions. In the Supreme Court's landmark decision in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), the Court held that:

Like private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases through its agents as it must of necessity...with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential

sellers...restraint of those who administer the Government's purchasing would constitute a break in settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.¹²

The *Perkins* decision remained the prevailing legal doctrine for the next 16 years. However, disappointed offerors eventually began successfully challenging procurements in the judicial system in 1956. The United States Court of Claims, the predecessor to the United States Claims Court and the current Court of Federal Claims established in 1992, found a cause of action for disappointed offerors pursuant to the Tucker Act of 1887. The Tucker Act established the court's jurisdiction over "express or implied contracts with the United States."¹³ Reasoning that contract solicitations constitute implied contracts, the Court of Claims decided in *Heyer Products Co. v. United States* (1956) that the Tucker Act provided a means for disappointed offerors to recover their bid and proposal costs in instances where the government failed to evaluate offers in good faith.¹⁴ Fourteen years later in the 1970 *Scanwell Laboratories, Inc. v. Shaffer* decision, the United States Court of Appeals granted disappointed offerors a cause of action in district courts pursuant to the Administrative Procedures Act (APA)¹⁵ which provided for judicial review in instances where federal agencies exceeded their statutory authority, failed to adhere to statutory required procedures, or acted in an arbitrary and capricious manner when exercising discretionary authority.¹⁶ As George Mason University School of Law Professor William E. Kovacic argues in his article "Procurement Reform and the Choice of Forum in Bid Protest Disputes," these court decisions collectively mark a critical and fundamental shift in the procurement system. This shift results in the divergence of government contract law from private contract law.¹⁷ The discretion and deference afforded executive agencies by the judiciary in procurement decisions no longer resembled that of private parties under private law as the Supreme Court reasoned in the *Perkins*

decision. Kovacic concludes that “access to the procurement process increasingly was depicted as a ‘right’ or ‘entitlement’ to be protected by more exacting procedural safeguards.”¹⁸

Despite this growth in the court’s jurisdiction through social constructivist rulings, the GAO continued to serve as the predominant venue for disappointed offerors’ bid protests due to its unmatched efficiency and expertise in procurement law. Yet the GAO still lacked any explicit legislative basis to decide protests. The Competition in Contracting Act (CICA) of 1984 provided the GAO, for the first time in 58 years since it began deciding bid protests, with the explicit legislative authority to do so.¹⁹

The expansion in the number of independent third-party contract dispute forums eventually raised questions concerning the efficacy of the system in terms of efficiency and promoting a uniform body of procurement law. In 1996, Congress took steps toward consolidation with the enactment of the Administrative Dispute Resolution Act (ADRA). While promoting alternative dispute resolution methods, the ADRA provided the Court of Federal Claims (COFC) and the 94 district courts with concurrent jurisdiction to decide both pre-award and post-award protests.²⁰ The ADRA contained a provision though requiring the GAO to study the issues associated with the COFC’s and district courts’ concurrent jurisdiction and to report its findings to Congress. Absent reauthorization, the district courts’ jurisdiction would expire January 1, 2001.²¹ In the ADRA mandated report, the GAO noted the characteristics relevant for evaluating whether the district courts should retain jurisdiction but remained silent on any overall policy recommendations. However, the report did include comments from the DoD arguing in favor of eliminating the district courts’ Scanwell jurisdiction on the basis that it would promote the development of a more uniform body of contract law while increasing the efficiency of the third-party bid protest regime.²² On the other hand, the American Bar Association (ABA)

advocated the district courts retain concurrent jurisdiction with the COFC. The ABA reasoned that the 94 district courts located throughout the United States increased judicial access for small businesses to a greater extent than the COFC, which resides in Washington D.C., noting an approximately equivalent use of both forums since the enactment of the ADRA.²³ However, Congress chose to allow the district courts' jurisdiction to expire in January 2001. Since 1921, the number of independent third-party protest forums grew considerably to include the GAO, COFC, and district courts. Currently, the independent third-party forums are now limited to the GAO and COFC.

Current GAO Protest Procedures

. . . if we were establishing a General Accounting Office today, we probably would not include bid protests as one of its functions. There is no clear relationship between GAO's audit and evaluation function and providing a quasi-judicial forum to hear a frustrated vendor's complaint that an agency failed to follow all the rules in awarding a contract.

— GAO General Counsel Robert P. Murphy,
Testimony before the United States House of
Representatives Committee on Government Reform and
Oversight and the Committee on National Security

Although the GAO and COFC exercise concurrent jurisdiction over contract award protests, the vast majority of protests are filed with the GAO. The GAO receives approximately 1,300-1,400 federal protests annually. Between the period January 1, 1997 and August 1, 1999, only 66 protests were filed in U.S. district courts and 118 protests were filed in the COFC.²⁴ Even if the COFC assumed the entire workload of the U.S. district courts when their protest jurisdiction expired, the GAO still considers that vast majority of protests. In addition, the GAO reports its protest statistics to Congress annually pursuant to 31 U.S.C. § 3554(e)(2)(2000) and is also available in Congressional testimony. This reporting provides a sample of convenience to compare the DoD's record to that of other federal agencies. For these reasons, the discussion here is limited to the procedural, jurisdictional, and substantive aspects of filing a protest with the GAO.

The procedure for filing a protest with the GAO is enumerated in 4 CFR Part 21. The process begins when an interested party, defined as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract,” provides written notice of protest to the GAO.²⁵ Among the most important elements of a protest, the disappointed offeror must provide a legal and factual basis for the protest accompanied by all relevant documents,²⁶ demonstrate their status as an interested

party,²⁷ and demonstrate compliance with the timeliness requirements.²⁸ A protest failing to demonstrate compliance with all procedural and jurisdictional requirements, discussed later, can be summarily dismissed without consideration on the merits.²⁹

The legal and factual basis for filing a protest typically involves alleged irregularities in the evaluation and award of a contract.³⁰ However, the GAO also hears protests concerning defective solicitations, cancellation of solicitations, and contract terminations attributable to a defective solicitation.³¹ There are limits to what the GAO will consider though. The GAO does not consider: contract administration matters that are subject to the Contract Disputes Act of 1978 and the dispute clause contained in the contract; matters questioning small business size standards and classifications; in most instances matters pertaining to a Small Business Certificate of Competency which are resolved by the Small Business Administration; Section 8(a) procurements under the Small Business Act; affirmative contractor responsibility determinations; various procurement integrity violations; decisions of subcontract protests unless requested by the contracting agency; suspensions or debarments; competitive range determinations; various procurement integrity violations; and, advisory opinions to agency tender officials with respect to public-private competitions.³²

The GAO normally strictly adheres to the timeliness requirements when exercising jurisdiction over a protest. For issues concerning solicitation improprieties, the protester must file a protest with the GAO before bid opening or the time established for receipt of proposals (or subsequent closing time where the impropriety was not present in the initial solicitation).³³ In most other instances, a protest must be filed “no later than 10 days after the basis of protest is known or should have been known (whichever is earlier).”³⁴ An exception is when the protester, pursuant to a competitive negotiation, requested a debriefing that the contracting agency is

required to provide upon request.³⁵ The pre-award and post-award debriefing requirements, established by the Clinger-Cohen Act and Federal Acquisition Streamlining Act (FASA), respectively, were intended to improve the communication between the protester and the contracting agency with the anticipated effect of reducing the number of protests. Therefore, in those instances, the protester must wait until the debriefing date and file no later than 10 days after the debriefing is conducted by the contracting agency.³⁶ Notwithstanding its normal strict adherence to timeliness requirements, the GAO may choose to consider untimely protests in very limited circumstances.³⁷ The GAO uses this authority “sparingly” in instances where extraordinary factors precluded the protester from adhering to the timeliness requirements or where the protest raises “novel or significant issues of interest to the procurement community.”³⁸

After a protest is submitted, the GAO typically provides written acknowledgment of receipt to the protester and notifies the contracting agency by telephone within one day (followed by a written notice).³⁹ Upon receiving notice from the GAO, the contracting agency is required to take several time sensitive actions. First, the contracting agency must notify the protester whether the contracting agency has already awarded the contract.⁴⁰ In instances where the contracting agency has not yet awarded the contract, the agency must also notify intervenors. Intervenors are other companies that participated in the competition that had a “substantial prospect of receiving an award.”⁴¹ The notification must include a copy of the protest, to the extent consistent with disclosure law, accompanied by instructions to correspond directly with the GAO on future matters pertaining to the protest including requests for dismissal.⁴² Second, the telephone notification to the contracting agency initiates a CICA stay of contract award until disposition of the protest.⁴³ The CICA stay provision requires the contracting agency to withhold contract award unless the head of the procuring activity decides performance of the

contract is justified based on “urgent and compelling circumstances.”⁴⁴ In instances where the contracting agency already awarded a contract prior to the GAO’s telephone notification, the contracting agency must suspend performance unless the head of the procuring activity determines that continued performance is justified based on “urgent and compelling circumstances” or is otherwise in the “best interest of the United States.”⁴⁵ Third, the contracting agency must provide the GAO a written report responding to the protest within 30-days of the initial telephone notification.⁴⁶

The contracting agency must also provide a copy of their report to the protester and intervenors.⁴⁷ The protester and intervenors receive an opportunity to comment on the contracting agency’s report within 10-days of the GAO receiving the report unless the GAO establishes another due date.⁴⁸ Again, the GAO strictly enforces the timeliness requirements of the process and will dismiss the protest if the disappointed offeror fails to provide comments on the contracting agency’s report within the established timeframe.⁴⁹

At this point in the process, the GAO typically considers the record closed and neither the contracting agency, protester, nor intervenors may provide additional information unless specifically requested by the GAO.⁵⁰ The GAO usually considers protests based on the aforementioned reports, comments, and other documents which constitute the written record. However, the GAO protest procedures were changed in 1991 to permit hearings to be conducted at the request of a party to the protest subject to the GAO’s concurrence or at the GAO’s own initiation.⁵¹

Once the written record is closed and at the conclusion of the hearing, if conducted, the GAO begins its deliberation. By statute, the GAO must render its decision within 100 calendar days from the date the protest was filed or within 65 calendar days under the express

procedures.⁵² In its deliberations, the GAO considers the record in its entirety to determine whether or not the contracting agency violated any statutes or regulations.⁵³ However, the protester bears the burden of proof. John Cibinic, Jr. and Ralph C. Nash, Jr. note in their book *Formation of Government Contracts* that “Under this standard, a protest must establish that the contracting agency had *prejudicially* violated a statute or regulation or has taken discretionary action *without a rationale basis* [*emphasis added*].”⁵⁴ Thus, an agency’s non-compliance with a statute or regulation is necessary but not sufficient. The protester must also demonstrate that such action biased an otherwise reasonable chance of receiving a contract award or that the contracting agency acted unreasonably in exercising its discretionary authority. In the latter case, the GAO grants great deference to the contracting agency’s discretionary authority. GAO Deputy General Counsel Daniel Gordon, testifying before Congress, notes that “[j]udgments about which offeror will most successfully meet governmental needs are for the procuring agencies. Our protest decisions are limited to the record we develop, shaped by the allegations raised by the protester and the responses put forward by the agency and awardee, and measured against the criteria established for the procurement by applicable statutes, regulations, and the agency’s solicitation.”⁵⁵ Thus, the GAO decisions reflect only on the propriety of the procurement process and not the outcome.

GAO decisions fall into three broad categories: dismissed, denied, and sustained. When the GAO sustains a protest, it recommends an appropriate remedy to the contracting agency. CICA specifies that the GAO may recommend that the contracting agency “refrain from exercising any of its options under the contract, re-compete the contract immediately, issue a new solicitation, terminate the contract, award a contract consistent with the requirements of such statute or regulation” or make other recommendations as appropriate.⁵⁶ This includes

recommendations for monetary damages to cover one or both of the protester's protest cost and bid and proposal costs.⁵⁷ Thus, the decisions of the GAO are technically non-binding on the parties lacking the full force and effect of law.⁵⁸ Nonetheless, only in extraordinary circumstances would a federal agency not comply with the GAO's decision since non-compliance will result in Congressional notification. The head of the procuring activity must notify the GAO in those instances where the agency does not intend to adhere to the decision.⁵⁹ In turn, CICA requires the Comptroller General to report any instance of non-compliance to the Senate's Committee on Government Affairs and the Committee on Appropriations as well as to the House of Representatives Committee on Government Reform and Oversight and Committee on Appropriations.⁶⁰ In the report, the Comptroller General recommends whether Congress should initiate an investigation, cancel funds, or provide other extraordinary relief.⁶¹

Motivations for Protests

It ain't over till it's over.

— Yogi Berra

The GAO's bid protest rules and procedures afford disappointed offerors many advantages over the COFC. The principle advantages frequently cited pertaining to the GAO bid protest rules and procedures include efficiency, relatively low cost to disappointed offerors, expertise in government contract law, and an automatic stay of contract award. Therefore, it comes as no surprise that the GAO represents the forum of overwhelming choice for disappointed offerors. However, frivolous protest may now be creating a substantial and undue burden on the government procurement system in terms of cost and delay. For 2009, the Comptroller General Gene Dodaro requested an increase of approximately \$40 million to the GAO's budget to accommodate the increased workload associated with federal bid protests.⁶² In the *Duncan Hunter National Defense Authorization Act For Fiscal Year 2009 Report of the Committee on Armed Services of the House of Representatives on H.R. 5658*, the Committee noted:

The committee is concerned that the submission of a bid protest is becoming pro forma in the event that a prospective contractor is rejected from the competitive range or the award of a contract is made to another vendor, and that the number of frivolous bid protests submitted to the Government Accountability Office may be increasing. While the committee remains committed to the right of prospective contractors to have an independent forum to adjudicate legitimate concerns about improprieties and errors during the bid and proposal evaluation process, the committee discourages the use of bid protests as a stalling or punitive tactic.⁶³

As a result, the Committee directed the GAO to review the DoD's bid protests over the past five years and report its findings to the Committee with any recommendations for improving the process.⁶⁴

Many, and hopefully most, protesters likely believe they have a reasonable prospect of winning on the merits of their case. However, the current system lacks any appreciable consequence that would deter disappointed offerors from filing a frivolous protest. In at least one instance, the current system actually provides a financial incentive for disappointed offerors to protest. Where the incumbent contractor loses a services contract award, the incumbent may in fact profit from filing a GAO protest due to the automatic CICA stay of contract award. The contracting agency faces the choice of experiencing an interruption of service, extending the incumbent, or overriding the CICA stay in the limited circumstances authorized. In their article entitled “A Critical Reassessment of the GAO Bid-Protest Mechanism,” Robert Metzger and Daniel Lyons articulate this point noting that “an incumbent contractor that loses the competition for a new contract may file a protest simply to stay performance of the new contract and extend its current contract for the duration of the GAO protest. As long as the marginal profit earned by extending the legacy contract exceeds the cost of the protest—and this usually is the case...—the temptation to engage in strategic behavior is always present.”⁶⁵ Thus, the disappointed offeror’s motivation for stalling arises from an economic benefit derived from the relative advantage afforded incumbents by the automatic stay provision of CICA.

In addition, other economic incentives likely provide an unstated motivation for protesting a contract award decision. In the high-stakes, winner-take-all world of major defense acquisition programs such as the KC-X program, the winner secures future revenue for decades. With the narrowing of the defense industrial base, and often with no similar program expected in the foreseeable future, major defense acquisition competitions take on a win at all cost atmosphere. According to James McCullough, a Government Contracts attorney, “For the winner, it’s going to be worth billions of dollars over the next 20 years. For the loser, they go

home.”⁶⁶ Even for more routine procurements of commodities and services, federal agencies including DoD often consolidate similar requirements, referred to as bundling, into a single competition in order to leverage the government’s buying power. This reduces the number of opportunities available to win government contracts. In a protest regime that provides no disincentive for those who are unsuccessful, it is only reasonable that companies feel a need to exhaust all potential avenues for securing government business.

The Committee suggests that some contractors may be protesting as a punitive tactic too. While some scenarios may provide clear incentives for disappointed offerors to protest permitting a reasonable inference as to motivation, although admittedly not conclusive, determining motivations in other instances such as this proves more problematic. A losing contractor may very well desire to punish the Government, winning contractor, or both but will obviously not state so. In a highly competitive market with low margins, delaying a competitor’s performance of the government contract in question could motivate some disappointed offerors to protest.

Aside from economic or punitive motivations, it is generally held that many protests occur due to a lack of communication. The Clinger-Cohen Act and Federal Acquisition Streamlining Act (FASA) established pre-award and post-award debriefing requirements that were intended to improve communications between industry and the contracting agencies. Disappointed offerors may request a pre-award debriefing within 3-days of notice of no longer being competitive for an award or a post-award debriefing within 3-days of notice of a contract award.⁶⁷ Pre-award debriefings shall include the contracting agency’s proposal evaluation, basis for elimination from the competitive range, and responses to the offeror’s questions as to how the source selection procedures were implemented.⁶⁸ Post-award debriefings shall include the

offeror's proposal weaknesses, the evaluated price, the technical rating, contract award rationale, and responses to the offeror's questions as to how the source selection procedures were implemented.⁶⁹

Despite these regulatory de-briefing requirements, the number of protests continues to rise. A lack of counterbalancing disincentives for protesting, particularly during a period of increased competitive pressure on industry, likely contributes to higher protest rates with more dismissals and fewer sustainments.

DoD’S Protest Statistics v. Other Federal Agencies’

Thus, for the price of a stamp, anyone can initiate litigation over the award of a contract—probably with the full support of his congressional representatives, and with a virtual guarantee of press coverage.

— Jacques Gansler
Former Under Secretary of Defense for Acquisition

Recent highly publicized protests such as the KC-X contract brought increased attention to the DoD procurement process and the GAO protest system. To determine whether a systemic problem unique to DoD exists, the DoD’s protest, dismissal, and sustainment rates were compared to those of all other federal agencies over the past five years. In an attempt to normalize the data, the protest rates are considered in relation to the percentage of federal dollars spent by the DoD compared to the other federal agencies.

The GAO protest statistics and federal dollars spent were obtained from publicly available sources. The protest statistics were obtained from Deputy General Counsel Daniel I. Gordon’s testimony before the Air and Land Forces Subcommittee, Committee on Armed Services, United States House of Representatives, released on 10 July 2008. Appendix I to this testimony provided statistics for all GAO bid protests. Appendix II provided statistics for all DoD components including each of the services as well as the Defense Logistics Agency and miscellaneous other DoD components. Therefore, the other federal agencies’ protest statistics were obtained by calculating the difference between the Appendix I statistics (All GAO Bid Protests) and the Appendix II statistics (DoD Component Bid Protests). The period covered was fiscal years 2004-2008. The fiscal year 2008 data only includes protests through 27 June 2008. These statistics differ from those reported annually by the GAO to Congress pursuant to the requirements of 31 U.S.C. § 3554(e)(2) (2000). The total protests provided in the Congressional testimony are approximately 9% less than those stated in the GAO annual reports. However,

they were used because they provided separate accounting for the DoD protests. The merit results and sustainment rates were consistent between the two sets of data suggesting that the difference in total protests likely resulted from the accounting of supplemental protests. Table 1 and Table 2 provide the summary statistics from the Congressional testimony and annual Congressional report, respectively.

Table 1: Congressional Testimony—Total Federal Protests (Including DoD)

Fiscal Year	Total Protests	Merit Results	Sustained	Sustainment Rate
2004	1354	365	75	21%
2005	1262	306	71	23%
2006	1223	249	72	29%
2007	1277	335	91	27%
2008*	1071	226	49	22%*

Source: Derived from Deputy General Counsel Daniel I. Gordon's testimony before the Air and Land Forces Subcommittee, Committee on Armed Services, United States House of Representatives, released on 10 July 2008.

*1 Oct-27 Jun 08

Table 2: Annual Report to Congress—Total Federal Protests (Including DoD)

Fiscal Year	Total Protests	Merit Results	Sustained	Sustainment Rate
2004	1485	365	75	21%
2005	1356	306	71	23%
2006	1327	249	72	29%
2007	1411	335	91	27%
2008*	1652	291	60	21%**

Source: Annual Report, Gary L. Kepplinger's Letter To Speaker of the House of Representatives The Honorable Nancy Pelosi, 22 December 2008.

*1 Oct-30 Sep 08

Any differences in the data are assumed to affect the DoD's and other federal agencies' protest statistics in the same or similar manner eliminating any significant bias.

Next, the federal contract dollars spent by the DoD and other federal agencies were obtained from Federal Procurement Reports produced from the Federal Procurement Data System—Next Generation (FPDS-NG) for fiscal years 2004-2006. Information for fiscal years 2007-2008 was not available (reflected as NA in Table 3, Table 4, and Table 5 below).

The contract dollars spent by the DoD and other federal agencies were used to calculate the respective percentages of total federal contract dollars. Table 3 provides a summary level overview for the DoD and federal agencies with respect to their percentage of total protests and percentage of contract dollars spent.

Table 3: Summary Level GAO Protest Statistics

Fiscal Year	Federal Government (Excluding DoD)		Department of Defense	
	% Contract Dollars	% Protests	% Contract Dollars	% Protests
2004	30%	46%	70%	54%
2005	30%	44%	70%	56%
2006	29%	40%	71%	60%
2007	NA	39%	NA	61%
2008*	NA	41%	NA	59%

Sources: Derived from Deputy General Counsel Daniel I. Gordon's testimony before the Air and Land Forces Subcommittee, Committee on Armed Services, United States House of Representatives, released on 10 July 2008, and Federal Procurement Reports from the Federal Procurement Data System--Next Generation (FPDS--NG).

*1 Oct-27 Jun 08

Table 3 indicates that in terms of the percentage of total contract protests compared to percentage of total contract dollars, the DoD actually fared well over the past five years. The DoD spent approximately 70% of the total federal contract dollars while only accounting for approximately 55-60% of the total contract protests.

Table 4 and Table 5 below provide an overview of the disposition of GAO protests for the DoD and other federal agencies during fiscal years 2004-2008 (through 27 June 2008). As previously discussed, the GAO decisions fall into three broad categories: dismissed, denied, and sustained. Protests that fail to meet the jurisdictional or procedural requirements established by statute or regulation, or otherwise fail to sufficiently articulate a legitimate legal or factual basis for protest, may be summarily dismissed.⁷⁰ Protests meeting jurisdictional and procedural requirements with a sufficient legal and factual basis are considered on the merits of the case with the GAO rendering its decision to deny or sustain the protest and recommending an appropriate remedy for sustained protests.

Table 4: Federal Government (Excluding DoD) GAO Protest Outcomes

Federal Government (Excluding DoD)									
Fiscal Year	% Federal Dollars Spent	Total Cases	Dismissals		Merit Results		Sustained		
			Total	% of Total Cases	Total	% of Total Cases	Total	% of Merit Results	% of Total Cases
2004	30.26%	623	471	75.60%	152	24.40%	39	25.66%	6.26%
2005	29.96%	556	404	72.66%	152	27.34%	43	28.29%	7.73%
2006	28.77%	484	386	79.75%	98	20.25%	34	34.69%	7.02%
2007	NA	502	367	73.11%	135	26.89%	29	21.48%	5.78%
2008*	NA	441	340	77.10%	101	22.90%	22	21.78%	4.99%

Sources: Derived from Deputy General Counsel Daniel I. Gordon's testimony before the Air and Land Forces Subcommittee, Committee on Armed Services, United States House of Representatives, released on 10 July 2008, and Federal Procurement Reports from the Federal Procurement Data System--Next Generation (FPDS--NG).

*1 Oct-27 Jun 08

Table 5: DoD GAO Protest Outcomes

Department of Defense									
Fiscal Year	% Federal Dollars Spent	Total Cases	Dismissals		Merit Results		Sustained		
			Total	% of Total Cases	Total	% of Total Cases	Total	% of Merit Results	% of Total Cases
2004	69.74%	731	518	70.86%	213	29.14%	36	16.90%	4.92%
2005	70.04%	706	552	78.19%	154	21.81%	28	18.18%	3.97%
2006	71.23%	739	588	79.57%	151	20.43%	38	25.17%	5.14%
2007	NA	775	575	74.19%	200	25.81%	62	31.00%	8.00%
2008*	NA	630	505	80.16%	125	19.84%	27	21.60%	4.29%

Sources: Derived from Deputy General Counsel Daniel I. Gordon's testimony before the Air and Land Forces Subcommittee, Committee on Armed Services, United States House of Representatives, released on 10 July 2008, and Federal Procurement Reports from the Federal Procurement Data System--Next Generation (FPDS--NG).

*1 Oct-27 Jun 08

As Table 4 and Table 5 indicate, both the DoD and the federal agencies experienced similar high dismissal rates and corresponding low decision rates on the merits. However, the statistics indicate that over the last five years the DoD typically experienced a slightly more favorable sustainment rate compared to other federal agencies. In consideration of the percentage of federal contract dollars executed by DoD compared to other federal agencies, the descriptive statistics suggest that the DoD experiences similar, if not more favorable, results with respect to GAO protests.

Admittedly, the statistics used to compare the DoD with other federal agencies herein is limited. The data does not include COFC protest statistics and the FPDS-NG data is not always reliable. The data also does not account for other variables such as number of transactions, acquisition complexity and category, nature of industrial base competing, etc. It also only covers a limited period.

Yet even when considering the federal contract protest statistics reported annually by the GAO to Congress, which are inclusive of DoD, the dismissal rates remain high and the sustainment rates remain low for the federal government. Since the dismissal category includes protests that failed to demonstrate legal and factual sufficiency, the high dismissal rates indicate the GAO rules and procedures may be structured such that an improper balance exists with respect to the system's primary goals of transparency and efficiency. The extent of the problem is difficult to ascertain from these statistics alone though since the dismissal category includes protests dismissed for procedural errors such as timelines that do not reflect on the overall merits of the protest.

Reform Initiatives

Everything that can be counted does not necessarily count; everything that counts cannot necessarily be counted.

— Albert Einstein

Ironically, the independent third-party protest regime originally established principally to permit disappointed offerors to challenge questionable discretionary actions of the federal government with respect to contract awards now finds the tables turned. Some reform initiatives being discussed may permit the federal government to in effect challenge a disappointed offeror's discretionary act of filing a protest where their protest is found to be frivolous (not unlike the arbitrary and capricious standard the Government is held to). Of course, the determination of frivolousness itself is a discretionary act. Adding to the irony, the GAO and lawmakers now must consider the appropriate method or methods to balance efficiency so that the cost of a maintaining the third-party protest regime does not exceed the value of the transparency provided by the system. In other words the issue fundamentally represents, in essence, a legal best value determination.

Revising the automatic CICA stay of contract award provision for protests filed with the GAO is one option for reducing the burden on the system and restoring balance. Because CICA requires the automatic stay of contract award upon the proper filing of a GAO protest, the system creates a presumption that the contracting agency erred. This stands in contrast to the COFC process which requires disappointed offerors to demonstrate the merits of enjoining a contract award. “. . . [T]he COFC will enjoin an award for the duration of the protest if the protester can show: (1) likelihood of success or irreparable injury, (2) balance of hardships tipping toward the protester, and (3) public interest favoring injunctive relief . . . Even in the absence of legislative change, the GAO can prevent abuse . . . [b]y adopting a more rigorous threshold review of the

adequacy of a filed protest.”⁷¹ These reforms may discourage disappointed offerors motivated solely by a desire to stall contract award for economic or punitive purposes. Because this reform imposes no cost on the disappointed offeror, this reform probably would receive less resistance.

A more controversial reform initiative would be the imposition of a financial penalty on disappointed offerors for filing frivolous protests. The precedent for imposition of financial penalties by the government for frivolous lawsuits (though a GAO protest is not actually a lawsuit) already exists in the area of tax law. For instance, 26 U.S.C. § 6673 of the Internal Revenue Code permits the tax courts to impose a penalty up to \$25,000 where the court finds the taxpayer undertook his or her lawsuit “primarily for delay”⁷² or for “frivolous or groundless”⁷³ reasons. The chilling effect that such authority would have on protests, as well as its impact on small businesses, suggests that any such reform initiative would likely be highly contested by industry.

Equally likely to be contested would be a reform initiative to track a disappointed offerors’ protest track record. The most familiar example of such a system is the monitoring of a contractor’s past performance on federal contracts and the use of that past performance data in future source selection decisions. An underperforming contractor faces a difficult time securing future government business. However, the downside is that such a system may discourage vigorous pursuit of legitimate claims. As George Washington University Law School Professor Steven Schooner notes, “[C]ontractors fear that they will receive degraded past performance ratings if their government customer perceives them as litigious.”⁷⁴

The magnitude of any reforms proposed by the GAO likely hinge on the extent of frivolousness identified. The statistics suggest the current system may require changes to strike a more appropriate balance between efficiency and transparency. Yet the statistics only serve as

an indicator since they do not distinguish procedural and jurisdictional dismissals from qualitative dismissals.

Conclusion

Most men die of their remedies, not of their illness.

—Molière

In 1926, the GAO served as the only independent third-party review forum for disappointed offerors to seek a review of federal contract award protests. Thirty years later, the judiciary established protest jurisdiction pursuant to the Tucker Act and later pursuant to the Administrative Procedures Act. Although the independent third-party protest regime expanded considerably since its inception in terms of fora to include even the 96 district courts, Congressional legislation has since limited contract protest jurisdiction to the GAO and COFC. Yet, the federal contract protest marketplace consisting of disappointed offerors largely decided the fora issue prior to Congressional action. When confronted with the decision of what forum to use, an overwhelming majority of disappointed offerors filed with the GAO.

In light of the recent increase in GAO protests annually, as well as the controversy surrounding many recent DoD acquisitions, both the DoD procurement process and the GAO protest system are now under review again. The Duncan Hunter National Defense Authorization Act of 2009 even contains a provision directing the GAO to review contract protests over the past five years to determine if frivolous protests represent a significant problem and recommend any reforms.

A review of publicly available data indicates that over the past five years the DoD experienced protest, dismissal, and sustainment rates consistent with those experienced by other federal agencies. The low sustainment and high dismissal rates experienced by both the DoD and other federal agencies suggests that the system may need to be modified in order to discourage frivolous protests. Three potential reform initiatives include revising the CICA

provision requiring the automatic stay of contract award upon filing the filing a GAO protest, assessing financial penalties, and tracking a contractor's protest history for use in a manner similar to other past performance data.

Notes

¹ Government Accountability Office (GAO), *GAO Sustains Boeing Bid Protest*, Press Release (Washington, D.C.: GAO, June 2008), 1, http://www.gao.gov/press/press-boeing2008jun18_3.pdf.

² Gen Norton A. Schwartz, Chief of Staff, United States Air Force (address, Air Force Association Convention, Washington D.C., 16 September 2008, <http://www.af.mil/shared/media/document/AFD-080916-083.pdf>).

³ The details concerning unethical conduct are beyond the scope of this paper. The examples provided are for analogy purposes only.

⁴ Jacques S. Gansler, *Affording Defense*. Cambridge, MA: Massachusetts Institute of Technology, 1989, 195-197.

⁵ *Ibid*, 195.

⁶ Peter Spiegel, “The \$35-Billion Competition Was Flawed, Gates Says. Bidding Will be Reopened, Keeping Boeing’s Hopes Aloft,” *Los Angeles Times*, 10 July 2008, <http://articles.latimes.com/2008/jul/10/business/fi-tanker10>.

⁷ Gary L. Kepplinger, To Speaker of the House of Representatives The Honorable Nancy Pelosi. Letter, 22 December 2008.

⁸ Richard Lardner, “Do Defense Contractors Protest Too Much?,” *USA Today*, 24 May 2008.

⁹ Government Accountability Office (GAO), *Bid Protests at GAO: A Descriptive Guide*, 3rd Edition (Washington, D.C.: GAO, 2006), 1.

¹⁰ John Cibinic, Jr. and Ralph C. Nash, Jr. *Formation of Government Contracts*. 3rd ed. Washington D.C.: The George Washington University, 1988, 1484.

¹¹ *Ibid.*, 1491.

¹² *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

¹³ John Cibinic, Jr. and Ralph C. Nash, Jr. *Formation of Government Contracts*. 3rd ed. Washington D.C.: The George Washington University, 1988, 1536.

¹⁴ William E. Kovacic, “Procurement Reform and the Choice of Forum in Bid Protest Disputes,” *The American University Administrative Law Journal*, 9 Admin. L.J. Am. U. 461, <http://lexis-nexis.com>.

¹⁵ Robert S. Metzger and Daniel A. Lyons. “A Critical Reassessment of the GAO Bid-Protest Mechanism.” *The Wisconsin Law Review*, 2007 Wisconsin Law Rev 1225, <http://lexis-nexis.com>.

¹⁶ 5 U.S.C. § 706.

¹⁷ William E. Kovacic, “Procurement Reform and the Choice of Forum in Bid Protest Disputes,” *The American University Administrative Law Journal*, 9 Admin. L.J. Am. U. 461, <http://lexis-nexis.com>.

¹⁸ *Ibid*.

¹⁹ 31 U.S.C. § 3551-56.

²⁰ The Administrative Dispute Resolution Act (Pub Law 104-320).

²¹ *Ibid*.

²² Government Accountability Office (GAO), *Bid Protests: Characteristics of Cases Filed in Federal Courts* (Washington, D.C.: GAO), April 2000, 48, www.gao.gov/archive/2000/g800072.pdf.

²³ *Ibid.*, 12.

²⁴ *Ibid.*, 3.

²⁵ 4 C.F.R. § 21.0(a)(1). With respect to a public-private competition, 4 C.F.R. § 21(a)(2) defines an interested party as the agency official responsible for submitting the tender.

²⁶ 4 C.F.R. § 21.1(c)(4).

²⁷ 4 C.F.R. § 21.1(c)(5).

²⁸ 4 C.F.R. § 21.1(c)(6).

²⁹ Government Accountability Office (GAO), *Bid Protests at GAO: A Descriptive Guide*, 3rd Edition (Washington, D.C.: GAO, 2006), 20. See also 4 C.F.R. 21.1(i).

³⁰ Government Accountability Office (GAO), *Bid Protests at GAO: A Descriptive Guide*, 3rd Edition (Washington, D.C.: GAO, 2006), 9.

³¹ *Ibid.*

³² 4 C.F.R. § 21.5(a) through 4 C.F.R. § 21.5(k).

³³ 4 C.F.R. § 21.2 (a)(1).

³⁴ 4 C.F.R. § 21.2 (a)(2).

³⁵ 4 C.F.R. § 21.2 (a)(2). Another exception, found in 4 C.F.R. § 21.(a)(3) is provided for instances where an agency level protest is denied.

³⁶ 4 C.F.R. § 21.2(a)(2).

³⁷ 4 C.F.R. § 21.2(c).

³⁸ Government Accountability Office (GAO), *Bid Protests at GAO: A Descriptive Guide*, 3rd Edition (Washington, D.C.: GAO, 2006), 13. See also 31 U.S.C § 3553(b)(1).

³⁹ 4 C.F.R. § 21.3(a); 31 U.S.C § 3553.

⁴⁰ 4 C.F.R. § 21.3(a).

⁴¹ 4 C.F.R. § 21.3(a).

⁴² 4 C.F.R. § 21.3(a).

⁴³ 31 U.S.C. § 3553(c)(1).

⁴⁴ 31 U.S.C. § 3553(c)(2).

⁴⁵ 31 U.S.C. § 3553(d)(3)(C).

⁴⁶ 31 U.S.C. § 3553.

⁴⁷ 31 U.S.C. § 3553.

⁴⁸ 4 C.F.R. § 21.3(h).

⁴⁹ Government Accountability Office (GAO), *Bid Protests at GAO: A Descriptive Guide*, 3rd Edition (Washington, D.C.: GAO, 2006), 29.

⁵⁰ *Ibid.*, 54.

⁵¹ John Cibinic, Jr. and Ralph C. Nash, Jr. *Formation of Government Contracts*. 3rd ed. Washington D.C.: The George Washington University, 1988, 1520.

⁵² 31 U.S.C. § 3554. See also 4 C.F.R. § 21.9 and 4 C.F.R. § 21.20.

⁵³ 31 U.S.C. § 3554(b)(1).

⁵⁴ John Cibinic, Jr. and Ralph C. Nash, Jr. *Formation of Government Contracts*. 3rd ed. Washington D.C.: The George Washington University, 1988, 1524.

⁵⁵ Daniel I. Gordon, Deputy General Counsel, Government Accountability Office (GAO), Testimony to the Air and Land Forces Subcommittee, Committee on Armed Services, House of

Representative. “Air Force Procurement: Aerial Refueling Tanker Protest,”
<http://www.gao.gov/htext/d08991t.html>.

⁵⁶ 31 U.S.C. § 3554(b).

⁵⁷ 31 U.S.C. § 3554(c).

⁵⁸ Robert S. Metzger and Daniel A. Lyons. “A Critical Reassessment of the GAO Bid-Protest Mechanism.” *The Wisconsin Law Review*, 2007 Wisconsin Law Rev 1225,
<http://lexis-nexis.com>.

⁵⁹ 31 U.S.C. § 3554(b)(3) and 31 U.S.C. § 3554(c)(3).

⁶⁰ 31 U.S.C. § 3554(e)(1).

⁶¹ 31 U.S.C. § 3554(e)(1).

⁶² Richard Lardner, “Do Defense Contractors Protest Too Much?,” *USA Today*, 24 May 2008.

⁶³ United States House of Representative, *Duncan Hunter National Defense Authorization Act For Fiscal Year 2009 Report of the Committee on Armed Services of the House of Representatives on H.R. 5658*, 110-652, 2008.

⁶⁴ *Ibid.*

⁶⁵ Robert S. Metzger and Daniel A. Lyons. “A Critical Reassessment of the GAO Bid-Protest Mechanism.” *The Wisconsin Law Review*, 2007 Wisconsin Law Rev 1225,
<http://lexis-nexis.com>.

⁶⁶ Richard Lardner, “Do Defense Contractors Protest Too Much?,” *USA Today*, 24 May 2008.

⁶⁷ FAR 15.505 and 15.506.

⁶⁸ FAR 15.505(e).

⁶⁹ FAR 15.506(d).

⁷⁰ Government Accountability Office (GAO), *Bid Protests at GAO: A Descriptive Guide*, 3rd Edition (Washington, D.C.: GAO, 2006), 20-21. See also 4 C.F.R. § 21.1 and 4 C.F.R. § 21.5.

⁷¹ Robert S. Metzger and Daniel A. Lyons. “A Critical Reassessment of the GAO Bid-Protest Mechanism.” *The Wisconsin Law Review*, 2007 Wisconsin Law Rev 1225,
<http://lexis-nexis.com>.

⁷² 26 U.S.C. § 6673(a)(1)(A).

⁷³ 26 U.S.C. § 6673(a)(1)(B).

⁷⁴ Schooner, Steven L., “Fear of Oversight: The Fundamental Failure of Businesslike Government,” *American University Law Review*, 50 Am. U.L. Rev. 627, <http://lexis-nexis.com>.

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